TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

A. JUDGE BROWN DOES NOT HAVE INHERENT JURISDICTION TO PROCEED.

Respondent first argues that Judge Brown has jurisdiction in this case to correct a procedural error. Clearly, a plain reading of §559.115.3 RSMo, establishes that he does not have jurisdiction because more than one hundred and twenty (120) days have elapsed. The fact that Judge Brown initially denied probation within 120 days has no bearing on the issue of whether he now has jurisdiction to conduct the challenged hearing.

Respondent urges this court to find the only error in the denial of probation was a procedural error, one which did not affect Mertens' substantive rights. Judge Brown's failure to conduct a hearing was not merely a procedural error which can now be remedied. Mertens had a substantive right to release on probation when he successfully completed the institutional treatment program, and received a favorable release recommendation, unless the court held a hearing and made certain findings at that hearing. It did not.

Respondent cities no authority in support of classifying the denial of probation in this case a mere "procedural" error, nor does he cite any authority for the proposition that the Circuit Court of Cole County has any inherent jurisdiction

to proceed to correct such an error.

B. THE ST. FRANCOIS COUNTY COURT'S CONDITIONAL WRIT DOES NOT ALLOW JUDGE BROWN TO CORRECT THE ERROR.

Respondent argues that the Cole County Circuit Court's jurisdiction is "buttressed" by the St. Francois County Circuit Court's issuance of a conditional writ of habeas corpus (Respondent's Brief p. 7.) Because Judge Brown has no inherent jurisdiction to proceed, he only has jurisdiction if such power is vested in him by another court. Respondent cites two cases, ***State ex rel. Nixon v. Dierker*** 22 S.W.3rd 787 (Mo. App. E.D. 2005) and ***State ex rel. Hahn v. Stubblefield***, 996 S.W.2nd 103 (Mo. App. E.D. 1999), in support of his proposition that a court sitting in habeas corpus has such authority. Each case is distinguishable.

In each case, the courts of appeals remanded the cases to the trial court to conduct "housekeeping" matters -- matters over which the trial court could not exercise discretion upon remand. In ***State ex rel. Nixon v. Dierker***, the habeas court remanded the case to the sentencing court for resentencing, but with specific instructions as to the sentence that was to be imposed -- a sentence which would coincide with the intent of the parties to the original plea agreement. ***Id***. at 790.

Likewise, in ***Hahn v. Stubblefield***, the habeas court remanded the case to the

trial court with specific directions to resentence the offender, taking into consideration the time he had already served, so that he could file a timely notice of appeal. ***Id***. at 108-109.

In neither case did the habeas court vest the sentencing court with authority to conduct a hearing or to exercise its own discretion, as Respondent urges here. A decision to allow the Circuit Court of Cole County to hold a hearing in this case would render the 2003 amendments to §559.115 meaningless. When the legislature amended the statute, it added the requirements that the sentencing judge conduct a hearing within ninety to one-hundred twenty days of the offender's sentence if he/she does not wish to honor a favorable release recommendation. If a hearing is held now, what meaning is given to the time limitations in the statute? Absolutely none.

Respondent further argues that Mertens' release on probation is not mandated under §559.115, the sentencing judge has discretion to deny probation based on the report that the Department of Corrections submits to him (Respondent's Brief, p.10). While the sentencing court does have limited discretion, that discretion is not absolute. In this instance, Judge Brown had the discretion to not automatically follow the recommendation for release, and he had the discretion to schedule a hearing to determine whether the probationary

recommendation release would be an abuse of discretion. Prior to the 2003 amendments to §559.115, the sentencing judge did have absolute discretion. If a judge chose to not release an offender to probation, that was his/her choice. But the 2003 amendments changed that - the legislature abolished the sentencing judge's absolute discretion and authorized the board of probation and parole to exercise its discretion to determine suitability for probationary release of offenders who participate in a treatment program. It is only those offenders who do not participate in a treatment program over whom the judge has absolute discretion.

Section 559.115 was amended to mandate that the sentencing judge follow a favorable recommendation in the report, unless he/she determined, after a hearing held within ninety to one-hundred twenty days, that the release recommendation constitutes an abuse of discretion.

For good reason, the courts of this state have always vested trial judges with a great deal of discretion in determining issues which they are in the best position to judge. When "abuse of discretion" is the standard of review in the appellate court, the appellant faces an extremely difficult hurdle. "An abuse of discretion" occurs when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. ***In re Care and***

Treatment of Spencer, 123 S.W.3rd 166, 168 (Mo. 2003). If reasonable persons can differ as to propriety of a trial court's action, then it cannot be said that the trial court abused its discretion. ***Id***. at 168.

Respondent argues that this court's grant of a permanent writ of prohibition would grant Mertens a "windfall"; he would be released on probation without giving Judge Brown, or any other judge, the opportunity to determine his suitability for release after a hearing (Respondent's Brief p. 10). First, release to probation following nearly nine months of unlawful confinement can hardly be deemed a "windfall." More importantly, the legislature has vested the board of probation and parole, not sentencing judges, the authority to determine the suitability of offenders for probationary release when the offender has completed an institutional treatment program pursuant to §559.115. A sentencing judge is authorized to not follow a favorable release recommendation only when the board of probation and parole has abused its discretion.

The court report investigation is a part of the record in this case. Is it possible for Judge Brown, or this court, to review that report and determine that Mertens' release to probation is clearly against the logic of the circumstances, and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration? Judge Brown is a reasonable man. Kimberly

Herman, (the author of the report) is a reasonable woman. They differ as to the propriety of Mertens' probationary release. But it cannot be said that such release would constitute an abuse of discretion.

CONCLUSION

Mertens has been illegally detained for nearly nine months. He respectfully Prays this court to make its preliminary writ absolute and order him released to probation.

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ATTORNEYS FOR RELATOR

CERTIFICATION UNDER RULE 84.06(c)

Comes Now, Douglas W. Hennon, Attorney for Relator, and pursuant to Supreme Court Rule 84.06 hereby certifies that:

1. Relator's Brief as submitted in the above styled cause includes the information required by Rule 55.03;

2. Relator's Brief compiles with the limitations contained in Supreme Court Rule 84.06(b);

3. As reported by the undersigned's copy of Microsoft Word 11, the word count of Relator's Brief is 1,456 words; and

4. Diskettes submitted to the court and to respondent have been scanned for viruses using Symantec Anti-Virus Version 7 updated as of March 20, 2006, and they are virus free.

_____

Douglas W. Hennon

CERTIFICATE OF SERVICE

Now on this ***15th*** day of ***June,*** 2006, the undersigned hereby certifies that two complete paper copies and one diskette containing Relator's Reply Brief were mailed via first class postage to:

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